Supreme Court, U.S.
FILED
NOV 24 1998
CLERK

(3)

No. 98-644

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES S. BARKER and EXPRESS GOLF, INC.,

Petitioners,

vs.

GOLF U.S.A., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

DAVID M. DUREE
Counsel of Record
REINERT & DUREE, P.C.
812 North Collins
St. Louis, MO 63102
(314) 621-5743
Attorneys for Petitioners

14 pp

QUESTIONS PRESENTED

I. **Whether the Federal Arbitration Act preempts state choice of law and forum selection substantive rules, applicable to all contracts and in all cases, when an arbitration clause is included.**

II. **Whether state law overrides the federal doctrine of separability established by Prima Paint v. Flood & Conklin Mfg. in cases governed by the Federal Arbitration Act.**

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Reply Brief 1

Argument 1

I. Certiorari is required to distinguish the issues governed by federal policy from those governed by general state contract law principles 1

II. The majority opinion below failed to apply Missouri choice of law rules, as required in diversity cases, but instead gave undue deference to a misperceived "strong federal policy favoring arbitration" 2

III. The Petition was properly presented to this Court by the Petitioners' attorney who is admitted and properly qualified to practice here 4

Conclusion 10

TABLE OF CITATIONS

CASES CITED

Page

Charles S. Barker, et al. v. Golf U.S.A., Inc., 154 F.3d 788 (8th Cir. 1998) 1

Cox v. Doctor's Associates, Inc., 613 N.E.2d 1306, 184 Ill. Dec. 714 (Ill. App. 1993), appeal denied, 622 N.E.2d 1202 (Ill. 1993), cert. denied, 510 U.S. 1118 (1994) 9

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. banc 1992) 3, 4

Jannotta v. Doctor's Associates, Inc., 125 F.3d 503 (7th Cir. 1997) 9

Pine Tree Associates v. Doctor's Associates, Inc., 654 So. 2d 735 (La. App. 1995), writ denied, 661 So.2d 467 (La. 1995) 9

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270 (1967) 2

Shaffer v. Jeffery, 915 P.2d 910 (Okla. 1996) 1, 2

Subway Restaurants, Inc., et al. v. Riggs, 696 N.E.2d 733, 231 Ill. Dec. 437 (Ill. App. 1998) .. 9

Yates v. Doctor's Associates, Inc., 549 N.E.2d 1010, 140 Ill. Dec. 359 (Ill. App. 1990) 9

STATUTES CITED

9 U.S.C. § 1 2

No. 98-644

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES S. BARKER and EXPRESS GOLF, INC.,

Petitioners,

vs.

GOLF U.S.A., INC.,

Respondent.

REPLY TO BRIEF IN OPPOSITION

The opinion below is now reported as Charles S. Barker, et al. v. Golf U.S.A., Inc., 154 F.3d 788 (8th Cir. 1998).

ARGUMENT

I. Certiorari is required to distinguish the issues governed by federal policy from those governed by general state contract law principles.

Golf U.S.A. argues that Oklahoma law does not require mutuality of obligation in arbitration clauses, relying upon Shaffer v. Jeffery, 915 P.2d 910 (Okla.

1996) in the same fashion as the majority opinion below. (Respondent's Brief, p. 12). Golf U.S.A. also misstates the issue as whether the Oklahoma Arbitration Act requires mutuality of obligation – not whether the Federal Arbitration Act and the doctrine of separability requires that the arbitration clause be treated as a separate contract – followed by its conclusion that the majority opinion below therefore does not conflict with Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967). (Respondent's Brief, p. 12). Petitioners respectfully submit that this misses the point entirely. Prima Paint established the doctrine of separability as a federal policy developed under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. Conflicting state law (either by statute or judicial decision) is preempted by this federal policy. Unlike Shaffer v. Jeffery, the case at bar is governed by the Federal Arbitration Act.

Neither the Eighth Circuit nor Golf U.S.A. have distinguished the issues governed by general state contract law principles from the issues governed by the federal policy developed under the Federal Arbitration Act. The difficulty the lower courts have in determining which issues are governed by general state contract law and which are governed by federal policy under the Federal Arbitration Act emphasizes the need for granting certiorari.

II. The majority opinion below failed to apply Missouri choice of law rules, as required in diversity cases, but instead gave undue deference to a misperceived "strong federal policy favoring arbitration."

Golf U.S.A. argues that the Court below correctly held that Oklahoma law governs the franchise agreement. (Respondent's Brief, pp. 6-9). The Eighth Circuit, however, failed to acknowledge or apply Missouri's choice of law rules (applicable in all diversity cases), stating simply that no persuasive reason was advanced for setting aside the choice of law provision in the contract, including the reasons articulated by the dissent. (Appendix, pp. 5a, 11a-14a). Missouri law enforces choice of law clauses unless to do so would violate a fundamental policy of Missouri. The majority opinion failed to discuss whether the choice of law clause would violate a fundamental policy of Missouri, because it was unduly concerned with its perception that failure to enforce the contract terms might "risk running afoul of the strong federal policy favoring arbitration." (Appendix, p. 8a).

Petitioners submit that application of Missouri's choice of law rules in this diversity case, as required, would have resulted in refusal to enforce the choice of law and choice of forum clauses because they conflict with Missouri public policy.

Golf U.S.A.'s unfair method of resolving disputes also conflicts with the general purpose of the Missouri Franchise Act, which was designed "to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices* * *" as "paternalistic legislation designed to protect those that could not otherwise protect themselves, * * *." High Life Sales Co. v.

Brown-Forman Corp., 823 S.W.2d 493, 498 (Mo. Banc 1992).

But for the majority's wish not to risk "running afoul of the strong federal policy favoring arbitration," the Eighth Circuit would have applied Missouri choice of law and choice of forum principles, generally applicable in all contract cases.

The failure of the Court below to apply basic contract law principles in a diversity case because the contract contained an arbitration clause reinforces the need to grant certiorari in this case. Most inferior courts have interpreted the recent rulings by this Court as mandating enforcement of all arbitration agreements, no matter how unfair, one-sided or oppressive.

Certiorari is required to establish the dividing line between issues governed by federal policy under the Federal Arbitration Act and issues governed by general state contract law principles that determine the validity and enforceability of these unfair, oppressive, one-sided arbitration contracts.

III. The Petition was properly presented to this Court by the Petitioners' attorney who is admitted and properly qualified to practice here.

Golf U.S.A. argues that the Petition "may" not be properly before the Court. (Respondent's Brief, p. 6). Golf U.S.A. claims an obligation to bring before the Court certain sanction awards against David Duree in several cases involving Doctor's Associates,

Inc. ("DAI"), the franchisor for Subway Sandwich Shops, under Supreme Court Rules 5, 8 and 15.

David Duree has been actively practicing law for 27 years, and is a member, in good standing, of the United States Supreme Court, the Supreme Court of Missouri, the Supreme Court of Illinois, the United States District Courts for Eastern Missouri, Southern Illinois and Central Illinois and the United States Courts of Appeal for the Second, Fifth, Seventh, Eighth and Federal Circuits. No disciplinary actions have been brought against him by any of these courts or the disciplinary commissions of Missouri or Illinois, the two states in which he is licensed.

Three of the sanction awards were entered by the Honorable Janice Russell in Johnson County, Kansas. One award was for an unintentional failure to produce documents to DAI. The second award was for allegedly signing pleadings in bad faith. None of those pleadings had been signed by Mr. Duree. He attempted to appeal that award, but the appeal was held to be premature because portions of the underlying case are still pending. The final award for $408,445.25 and removing Mr. Duree's authority to practice *pro hac vice* was entered pursuant to motions filed by DAI. Judge Russell subsequently admitted that she had become unable to be fair and impartial in considering matters concerning Mr. Duree before these rulings were entered, as a result of an *ex parte* communication with John Gerstle, which caused Judge Russell to incorrectly believe that Mr. Duree's client had a drug problem, that Mr. Duree knew of it, and that this drug problem was the cause of an

amended tax return which Judge Russell also concluded was false and fraudulent.

Judge Russell subsequently testified that this *ex parte* conversation occurred seven days before her initial ruling against Mr. Duree. Mr. Gerstle testified that he believed the conversation had occurred much earlier. Eight weeks after the date on which Judge Russell contended the conversation occurred, without having disclosed her inability to be fair and impartial, Judge Russell presided over a disputed hearing about the final judgment (journal entry) to be entered with respect to her rulings against Mr. Duree. Over objection, she accepted a formal judgment drafted by the attorneys for DAI, which included numerous findings not contained within her original memorandum order which was entered seven days after she now admits she was unable to be fair and impartial.

Before hearing Mr. Duree's motion to set aside these orders, Judge Russell recused herself and disclosed her inability to be fair and impartial. The successor judge subsequently stated that he did not believe it was his job to second guess Judge Russell on these matters, and the case was appealed to the Kansas Supreme Court, where it was argued on October 28, 1998.

Mr. Duree respectfully submits there is nothing wrong with the amended tax return – it has been on file with the Internal Revenue Service, which has not challenged it, for more than five years. There was no evidence that it did not accurately state the tax

liabilities of Mr. Duree's clients and their taxable income or loss. Furthermore, Mr. Duree was charged with using the amended tax return to mislead Judge Russell in responding to DAI's summary judgment motion during 1995. At that time, Judge Russell ruled that the original and amended tax returns were not material to that proceeding. There was also no evidence that Mr. Duree used the amended tax return in any way, either in oral argument or in the pleadings, to mislead Judge Russell, or for any purpose. Judge Russell also ruled that other attorneys representing the same clients as Mr. Duree, who had actually signed the pleadings cpposing DAI's summary judgment motion, engaged in no wrongdoing. There was no evidence that Mr. Duree had read the amended tax return, or knew of its contents, at the relevant time, and Mr. Duree testified, accurately, that he had not read the amended tax return, and did not know of its contents, until long after DAI filed its motions against him. Mr. Duree believes that the Kansas Supreme Court will reverse these decisions. If it does not, he will certainly apply to this Court for certiorari.

The disciplinary commissions of Illinois, Missouri and Kansas have not initiated any proceedings against Mr. Duree. They merely opened informational files when Judge Russell, at the urging of DAI, sent a copy of her initial rulings to the Illinois and Missouri disciplinary commissions. One of DAI's attorneys sent another copy to the Kansas disciplinary commission. Mr. Duree has not been interviewed by the disciplinary commissions of Missouri, Illinois or Kansas, no investigation has been undertaken, and these disciplinary commissions

have done nothing more than open informational files and receive copies of the pleadings filed in the Kansas courts.

Thompson Coburn, the lead attorneys for Golf U.S.A., also represent DAI (the Subway franchisor) in several cases in which David Duree represents the franchisees. All seven sanctions awards that Thompson Coburn, on behalf of Golf U.S.A., described at p. 6 of Respondent's Brief, were entered at the request of DAI, which has filed numerous motions for sanctions and for contempt awards against Mr. Duree in the past 10 years. This is a standard litigation tactic for DAI, which uses motions for sanctions and the threat of motions for sanctions and motions for contempt as a routine litigation tactic. DAI threatened Mr. Duree's attorney in Kansas with sanctions if he did not withdraw Mr. Duree's position based upon Judge Russell's admitted inability to be fair and impartial and filed one other sanction motion against Mr. Duree's Kansas attorney, which was denied.

When litigating with DAI, it is necessary to prevail on almost every issue to avoid being subjected to a motion for sanctions or the threat of a motion for sanctions. One of the sanctions awards was for $80.00. With the exception of the $408,445.25 award in the Subway v. Kessler case, and the award for an unintentional violation of a discovery requirement described above, all awards were for pursuing claims against DAI, which the court in question ultimately found to be without merit.

On the other hand, DAI and its two owners, Frederick DeLuca and Peter Buck, have a long history of judgments against them for fraud and related misconduct. During 1997, Frederick DeLuca received income of $120,000,000.00 and Peter Buck received income of $73,000,000.00 from their Subway operation, and from investing the wealth obtained therefrom. Some of the cases finding DAI, Frederick DeLuca and Peter Buck liable for fraud and/or oppressive conduct with respect to the landlords and franchisees with whom they do business include Jannotta v. Doctor's Associates, Inc., 125 F.3d 503 (7th Cir. 1997); Cox v. Doctor's Associates, Inc., 613 N.E.2d 1306, 184 Ill. Dec. 714 (Ill. App. 1993), appeal denied, 622 N.E.2d 1202 (Ill. 1993), cert. denied, 510 U.S. 1118 (1994); Yates v. Doctor's Associates, Inc., 549 N.E.2d 1010, 140 Ill. Dec. 359 (Ill. App. 1990); Subway Restaurants, Inc., et al. v. Riggs, 696 N.E.2d 733, 231 Ill. Dec. 437 (Ill. App. 1998); Pine Tree Associates v. Doctor's Associates, Inc., 654 So. 2d 735 (La. App. 1995), writ denied, 661 So. 2d 467 (La. 1995), along with numerous, other, unreported decisions. In 1997, while Mr. DeLuca was receiving $120,000,000.00 and Mr. Buck was receiving $73,000,000.00, their assetless, alter-ego, leasing companies, including Subway Sandwich Shops, Inc., Subway Restaurants, Inc. and Subway Real Estate Corp. had a number of unpaid judgments against them which had been pending and unpaid for many years. See Jannotta v. Doctor's Associates, Inc., supra.

DAI uses an extremely oppressive, unfair and one-sided franchise agreement. The terms are not negotiable. See the petition for certiorari filed by Erik

Hamilton against Doctor's Associates, Inc., Supreme Court No. 98-630, now pending before this Court. DAI's brief in opposition is due by December 15, 1998.

Golf U.S.A.'s suggestion (Respondent's Brief, p. 6) that it was required to bring these matters to the Court's attention under Supreme Court Rules 5, 8 and 15 is unfounded. Mr. Duree is already admitted to this Court. There is no basis in fact for suggesting that he should be disbarred by this Court. This suggestion by Golf U.S.A. is simply an attempt to distract the Court's attention from the merits of the issues presented here.

CONCLUSION

For the reasons stated in the Petition, and in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID M. DUREE
Counsel of Record
REINERT & DUREE, P.C.
812 North Collins
St. Louis, MO 63102
(314) 621-5743

Attorneys for Petitioners